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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE MICHAEL LANE,

Defendant and Appellant.

F074342

(Tuolumne Super. Ct.
Nos. CRF46247, CRF45820,
CRF44964 & CRF46146)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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SEE CONCURRING OPINION

INTRODUCTION

Appellant/defendant George Michael Lane was charged and convicted of multiple felonies based on a series of incidents that occurred in 2014 and 2015. He was sentenced to an aggregate second strike term of 27 years in prison. On appeal, he contends that his felony conviction for violating Vehicle Code section 10851, subdivision (a), unlawfully taking or driving a vehicle, must be reduced to a misdemeanor because the People failed to prove the value of the stolen car was more than $950, as required by Penal Code section 490.2 and Proposition 47. He also contends the court should have granted his motion for acquittal, made when the People rested, to dismiss the residential burglary charge for insufficient evidence. Finally, he contends the court improperly imposed consecutive sentences for two counts, and the matter must be remanded for the court to consider whether to dismiss the prior serious felony enhancement.

We will remand the matter as to count I for resentencing and correction of the abstract of judgment, and otherwise affirm.

FACTS

Defendant was charged and convicted in a single jury trial of multiple offenses arising from four incidents that occurred in 2014 and 2015.

PART I

PURSUIT OF THE WHITE MAZDA ON AUGUST 22, 2014 (COUNTS I–IV)

On August 18, 2014, Andria Albanez dropped off her Mazda Protégé for repairs at Miller Brothers Automotive in Big Oak Flat in Tuolumne County. Ms. Albanez was the registered owner of the greenish-blue Mazda and did not give anyone permission to drive her car. She believed the car was still at the repair shop on August 22, 2014. Ms. Albanez did not know defendant.

At some point prior to or on August 22, 2014, the Mazda was stolen from the yard at Miller Brothers.

On the afternoon of August 22, 2014, California Highway Patrol (CHP) Officer Stephen Griefer was in uniform in a marked patrol car. He was parked on the shoulder of a road in Groveland.

A driver stopped and informed Officer Griefer that there might have been a traffic collision on the road ahead of him. Griefer drove east on Old Priest Grade, up the hill toward the possible collision. His patrol car was passed by two vehicles going down the hill in the opposite direction on Old Priest Grade, traveling approximately 25 miles per hour. The first car was white, and the second car was silver. As the vehicles passed Griefer, the driver of the silver vehicle looked directly at Griefer and gave the impression that something was wrong. Griefer decided to catch up with the two vehicles and made a U-turn.

As Officer Griefer drove west behind the two cars, both vehicles accelerated to a high rate of speed. Griefer activated his patrol car's red lights to make traffic stops. The silver vehicle pulled over and allowed Griefer to pass. The white car continued and made an "aggressive movement" to the right shoulder and stopped. Several people jumped out of the white car and ran away, but the driver remained in the car. Griefer used his patrol car's loudspeaker and ordered them to get back into the vehicle. They ignored his orders and kept running.

After they ran from the white car, the driver made "an aggressive U-turn." Officer Griefer also made a U-turn but had to hit his emergency brake and stop "or that [white] vehicle was going to ram my patrol car."

Officer Griefer testified that as the white vehicle finished the U-turn, he was within three feet of the driver's side of the vehicle. Griefer testified defendant was in the driver's seat. Griefer recognized defendant because he had met him several times before that date.[1]

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[1] It was stipulated that defendant'd California driver's license had been suspended between August 2014 and February 2015 due to a prior conviction for driving under the

Officer Griefer turned around his patrol car and followed the white car. He activated his siren and called dispatch for assistance. Defendant accelerated the white car to a higher rate of speed. Defendant ignored the patrol car's siren and ran a stop sign, reached speeds up to 80 miles per hour, made an aggressive right turn, and almost hit another car. Defendant drove "extremely recklessly" and crossed over the double yellow lines in the road.

Officer Griefer's patrol car overheated and he had to give up the pursuit. Griefer parked on the side of the road and waited for his vehicle to cool down. While he was waiting, he reviewed the footage from his dashboard camera and confirmed defendant was driving the white car.

Officer Griefer had obtained the white car's license plate during the pursuit. He contacted dispatch and learned it was a Mazda Protégé. Another officer in the department recognized Ms. Albanez's name as the registered owner of the Mazda, contacted the family, found out about the history of the Mazda, and relayed this information to Griefer.

The Investigation

Officer Griefer was able to restart his patrol car after about 10 minutes. Based on the information about the Mazda's ownership, he drove to Miller Brothers Automotive shop and made contact with Dawn and Lee Miller. Dawn Miller was advised that defendant was suspected of driving the Mazda, and where the car was last seen. Ms. Miller informed Griefer where she believed defendant was living. She suspected the stolen Mazda could be there and gave him directions to a rural area of Groveland.

About 30 minutes later, Officer Griefer arrived on the dirt road described by the Millers. There were isolated homes in an area surrounded by heavy brush. Griefer's

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influence, and that defendant had knowledge that his license was suspended during that time.

patrol car was followed by five marked vehicles with officers from different law enforcement agencies who had joined in the investigation, including the Fish and Game Department. Griefer testified the officers never placed a roadblock in the area.

Officer Griefer reached the residence described by Ms. Miller. He contacted Cindy DeCoster and Scott Lane, defendant's brother. Griefer was familiar with Ms. DeCoster from prior contacts and had previously seen her intoxicated, but she did not appear intoxicated when he spoke to her. The house had been damaged by a fire, and Scott Lane and Ms. DeCoster were living in a trailer parked next to the house.

Ms. DeCoster told Officer Griefer that defendant had been there. When defendant arrived, he ran inside and said, " 'I need to lay down, the cops are after me.' " Defendant used a mattress that was in the damaged house. When the officers checked the house, however, the back door was opened, and defendant was not there.[2]

Ms. DeCoster and Scott Lane gave permission to search the house and property, which was in a very rugged area. The officers did not find defendant or the Mazda and left.

Ms. Miller Finds Defendant and the Car

Later that same evening, Ms. DeCoster contacted Dawn Miller and told her where the white Mazda was. Ms. Miller and some employees from her repair shop drove to the area where the officers had previously searched. They found the Mazda about 100 feet from Ms. DeCoster's residence, "buried" within the bushes. The Mazda had been partially painted with white primer.

Ms. Miller also found defendant, who was hiding inside a boat that was parked next to the Mazda. Ms. Miller called both the police and sheriff's departments after she found defendant and the Mazda.

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[2] At trial, Ms. DeCoster denied that defendant said the police were after him. Officer Griefer testified to her prior statements.

Defendant Apologizes for Stealing the Mazda

Ms. Miller testified they waited for several hours with defendant at Ms. DeCoster's residence for officers to arrive. Ms. Miller testified that while they waited, defendant "apologized for stealing it," referring to the Mazda. Defendant "apologized several times for hours while we were waiting for the sheriffs to arrive."

Ms. Miller drove back to her repair shop and retrieved the tow truck. When she returned to Ms. DeCoster's residence, she learned defendant and his brother Scott had exchanged words with Mr. Miller and the shop's employees about the theft of Mazda.

Ms. Miller testified that, at the time of this incident, defendant's truck was in their shop for repairs.

> "Q. But the defendant apologized to you for stealing that car?
>
> "A. Yeah. He hand wrote me out a bill of sale for his truck, basically giving it to us in lieu of the damages that he did to that vehicle when he stole it."

While Ms. Miller was waiting for the police, she also tried to reach Officer Griefer. He was on duty in a remote location and did not have radio or cell phone reception. At 9:15 p.m., Griefer finally received Ms. Miller's call.

Defendant was not taken into custody that night.

Defendant's Arrest and Statements

On September 14, 2014, Deputy Donaldson of the Tuolumne County Sheriff's Department arrested defendant at the Miner's Mart, a gas station in Groveland. The arrest was based on charges unrelated to Officer Griefer's pursuit of the Mazda on August 22, 2014. Donaldson advised defendant of the warnings pursuant to *Miranda*.[3] Defendant said he understood and agreed to talk with him.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436

As Deputy Donaldson drove defendant to the county jail, he approached Old Priest Grade where Officer Griefer had begun the pursuit of the Mazda. Defendant said, " 'You guys got it all wrong with that pursuit.' " Donaldson asked defendant if he was referring to the pursuit "he was in with CHP and Fish and Game." Defendant said he was not driving the car, he knew who was driving, and he would not identify the driver because he was not a "snitch."

Defendant said during that particular pursuit, he was in another car with a friend, he was stopped at a roadblock in Groveland, and he saw the pursuit go past him. Defendant said he saw the cars from the sheriff's department, CHP, and Fish and Game chasing the vehicle. Officer Donaldson asked for the name of the friend he was with that day. Defendant refused to identify the friend without his permission.

Defendant said a couple of weeks after he saw the pursuit, he received a letter from the district attorney's office, advising him that he was being charged with the vehicle pursuit.[4]

Convictions

Based on this incident, defendant was charged and convicted of committing the following offenses on August 22, 2014:

> Count I: unlawfully driving or taking of a vehicle, a Mazda Protégé belonging to Ms. Albanez (Veh. Code, § 10851, subd. (a));[5]
>
> Count II: evading an officer in willful disregard for public safety (Veh. Code, § 2800.2, subd. (a));

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[4] Officer Griefer testified he wrote a citation to defendant based on the pursuit of the Mazda, attached it to his report about the incident, and it was sent to the district attorney's office. Griefer did not send the citation to defendant.

[5] In issue I, *post*, we find that defendant's conviction for a felony violation of Vehicle Code section 10851, subdivision (a), unlawfully taking or driving the Mazda, must be reduced to a misdemeanor based on the California Supreme Court's application of Proposition 47 to convictions based on the theft aspect of the statute.

Count III: evading a police officer while driving against traffic (Veh. Code, § 2800.4); and

Count IV: misdemeanor driving with a suspended license, with a prior conviction for driving under the influence (Veh. Code, § 14601.2, subd. (a)).

PART II

PURSUIT OF THE BLUE CAMAROON DECEMBER 27, 2014 (COUNT V)

On the evening of December 27, 2014, Deputy Benson of the Tuolumne County Sheriff's Department was in uniform and on patrol in his marked Ford Expedition.

Deputy Benson was driving eastbound on Highway 120 through downtown Groveland. A dark blue Chevrolet Camaro was directly in front of him. It did not appear to have a rear license plate. Benson turned on his patrol vehicle's flashing lights and tried to conduct a traffic stop because of the apparent missing license plate.

The Camaro initially slowed down, then accelerated and went through a stop sign. Deputy Benson activated the siren on his patrol vehicle. The Camaro turned right at such a high rate of speed that it crossed into opposing traffic and veered up an embankment. The Camaro "bounced" off the embankment, returned to the road, went through another stop sign, turned, and again accelerated.

Deputy Benson followed the Camaro with both the lights and siren activated on his patrol vehicle. The Camaro was going between 60 to 70 miles an hour in a posted zone of 25 miles an hour and crossed over the center double-yellow line. The driver made various turns and accelerated to 90 miles an hour on a street that was posted at 55 miles an hour.

The Camaro slowed for a U-turn and went through another stop sign. Deputy Benson's patrol vehicle was going east while the Camaro was going west, and the two vehicles were traveling towards each other. Benson saw the Camaro's front license plate. He could also see the driver, who was holding his left arm up to his face and trying to obscure his identity.

As the pursuit returned to Groveland, the Camaro was traveling at 60 miles per hour in a posted zone of 25 miles an hour. Deputy Benson slowed down for public safety reasons but left on the lights and siren on his patrol vehicle. The Camaro kept going and Benson lost sight of it. Benson ended the pursuit after the 5.2-mile chase.

During the pursuit, Robin Abbott, a civilian, was in Deputy Benson's patrol vehicle as a ride-along passenger. Abbott got a "glimpse" of the driver of the Camaro, and testified he had shoulder-length grey hair and a long beard, he was wearing a flannel shirt, and had a cap on backwards.

Neither Deputy Benson nor Mr. Abbott could identify anyone as the driver at the time of the pursuit.

Discovery of the Camaro

On December 31, 2014, four days after the pursuit, Deputy Benson was on a routine patrol when he saw a blue Camaro parked in the front yard of a residence in Groveland. He had never seen that car in the area before. Benson knocked on the home's front door, but no one answered. Benson recognized it as the same Camaro from the pursuit.

There were cracks and scrapes in the paint on the driver's side front bumper, consistent with the side of the Camaro that hit the embankment. Benson discovered the Camaro had a rear license plate, but the frame had been flipped down over the back bumper, so the plate was not visible.

Deputy Benson did not obtain a search warrant or attempt to seize the blue Camaro. He took photographs of the vehicle and left it parked in front of the residence.

Constance Krischan lived in Jamestown, a few houses away from defendant's mother. Defendant lived with his mother, and Ms. Krischen was acquainted with him. Ms. Krischan testified that on or about December 31, 2014, she saw a blue Camaro parked in front of defendant's house. It was the first time she had seen defendant with a blue Camaro.

Conviction

Based on this incident, defendant was charged and convicted of count V, evading an officer in willful disregard for public safety on December 27, 2014 (Veh. Code, § 2800.2, subd. (a)).

PART III

BURGLARY AND JEWELRY THEFT ON JANUARY 3, 2015 (COUNT VI)

Ms. Krischan, who was acquainted with defendant, lived in a house with two roommates. Ms. Krischan had her own bedroom. She kept her jewelry in three distinctive boxes that were hidden under a pile of clothes in her bedroom.

As of January 3, 2015, Ms. Krischan had known defendant for about a year and a half, and he had been to her residence prior to that date. Ms. Krischan had previously shown defendant some of her jewelry and gave defendant some antique watches to fix or sell that she considered junk. Defendant had never been inside her bedroom and did not have permission to enter it, but he had permission to use the bathroom adjacent to her bedroom.

Defendants Asks Ms. Krischan for a Favor

On January 3, 2015, defendant arrived at Ms. Krischan's residence with Dawn Murphy. Defendant asked Ms. Krischan if she could drive two other friends to run errands because the wheel on his car was bad.

Ms. Krischan testified defendant's car was a blue Chevrolet Camaro, and it was parked in front of his mother's house that day.

Ms. Krischan agreed to give a ride to defendant's friends. Defendant left Ms. Krischan's house with Ms. Murphy, and they appeared to walk toward defendant's house.

Ms. Krischan left with defendant's two friends and drove them to Groveland. They were gone for three to four hours.[6] Before Ms. Krischan left with the two friends, she saw defendant and his brother working on the blue Camaro.

Ms. Krischan Discovers Ms. Murphy in her House

When Ms. Krischan returned to her house, she found Ms. Murphy was inside. Defendant was not present. Ms. Krischan testified Ms. Murphy did not have permission to be in the house. Ms. Murphy walked out of the bathroom that was adjacent to Ms. Krischan's bedroom.

Ms. Murphy was holding a small handbag and a plastic grocery bag. Ms. Murphy had a tracheotomy in her throat and told Ms. Krischan that she used the bathroom to change the dressing.

Ms. Krischan offered Ms. Murphy a ride home. Ms. Murphy refused and was "very nervous and wanted to leave in a hurry. She didn't want to be around me." There was a cab driving down the road, and Ms. Murphy flagged down the cab and left. Ms. Krischan never saw defendant at that time.

Ms. Krischan Also Discovers her Jewelry is Missing

After Ms. Murphy left, Ms. Krischan discovered her bedroom had been ransacked and almost all of her jewelry was missing. Ms. Krischan was distraught and called defendant and yelled and screamed at him.

"[THE PROSECUTOR]: [W]hat did you ask him for?

"A. I think I was yelling and screaming at him … what's going on, and why is this woman in my home, and where are you …

"Q. Okay. And did you accuse him of stealing the jewelry?

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[6] Ms. Krischan testified she had prior felony convictions for maintaining a place for sellers to use drugs, conspiracy to commit credit card access fraud, and possession of counterfeiting equipment for credit cards. Ms. Krischan further testified that defendant's two friends, who she drove to Groveland, later helped her make counterfeit credit cards.

"A. Yes, but it was more that I held him responsible. I don't know that he actually stole it because I wasn't there, but these were his people."

In response, defendant told Ms. Krischan, " 'No, it's not like that,' and, 'I'll get it back for you.' " Ms. Krischan testified defendant sounded pretty upset during this conversation.

Around 10:30 p.m., defendant sent a text message to Ms. Krischan that stated: " 'I was able to get your stuff, I'll see you shortly, in a few hours.' " Ms. Krischan believed that defendant would show up before midnight and bring her jewelry.

Defendant failed to appear and never returned the jewelry. Defendant's blue Camaro was not in front of his house, and Ms. Krischan did not see him. Ms. Krischan contacted law enforcement and reported the theft.

Ms. Krischan Reports the Burglary and Theft

On January 4, 2015, Ms. Krischan met with Deputy Egbert and reported the burglary of her bedroom and theft of her jewelry.[7] She was angry and told Deputy Egbert that she believed defendant took the jewelry. Ms. Krischan told Deputy Egbert that she had called defendant and said, " '… I leave my house for a couple hours and you come over and ransack my house and take my things.' " Ms. Krischan could not recall if she told Deputy Egbert that Ms. Murphy had been at the house.[8]

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[7] As we will explain in issue II, *post*, the People were unable to call Deputy Egbert in the case-in-chief because he was on military duty. The court allowed the prosecution to "close" without resting, pending Egbert's return to law enforcement duty. The defense moved for acquittal on count VI, burglary, and the prosecution made an offer of proof of Egbert's expected testimony. The court denied the motion for acquittal. Thereafter, the defense presented its case. Egbert became available after the defense rested, the court permitted the People to reopen the case for Egbert's testimony, and Egbert testified as set forth herein.

[8] In issue II, *post*, we will address defendant's argument that the court should have granted the motion he made when the People rested, for judgment of acquittal of count VI, burglary, because the People failed to introduce evidence he committed the burglary as the direct perpetrator or an aider and abettor.

Conviction

Defendant was charged and convicted of count VI, first degree residential burglary of Ms. Krischan's residence on January 3, 2015 (Pen. Code, § 459).

PART IV

SECOND PURSUIT OF THE BLUE CAMARO JANUARY 4, 2015 (COUNTS VII–IX)

At approximately 2:24 a.m. on January 4, 2015 (a few hours after Ms. Krischan's jewelry was taken and defendant's text message about returning the items), Deputy Jerry McCaig of the Tuolumne County Sheriff's Department was in uniform and driving a marked patrol vehicle. He saw a vehicle driving in the opposite direction at a high rate of speed, above the posted limit of 55 miles an hour. The vehicle passed McCaig and continued in the opposite direction. McCaig recognized it as an early 1990's model blue Chevrolet Camaro.

Deputy McCaig made a U-turn, turned on the siren and flashing lights on his patrol car, and had to drive over 100 miles per hour to catch up with the Camaro. He recorded the license plate number (No. 6EKH446). The driver of the Camaro did not stop, swerved erratically across both sides of the road, and traveled over 60 miles per hour.

The driver of the Camaro tried to turn right without signaling. The Camaro was going too fast and the driver had to make a "screeching halt" to avoid hitting a tree.

The Camaro Hits Deputy McCaig's Patrol Car

Deputy McCaig pulled behind the Camaro's right rear side. McCaig started to open his driver's door and intended to get out of his patrol car. The Camaro's rear taillights suddenly activated. McCaig closed the driver's door of his patrol car and stayed in his vehicle. The Camaro backed up rapidly and made a slight turn to the right, so the front end swung to the left. The Camaro's right rear quarter panel hit the left front fender of McCaig's patrol car "in a side swipe kind of collision," and inflicted scrapes, a broken

corner marker light, and other damage. McCaig testified that if the driver had pulled the Camaro straight back without turning the wheel, it would have missed the patrol car.

After the Camaro hit Deputy McCaig's patrol car, it went rapidly forward with spinning rear wheels and turned to the left. At that point, the Camaro's driver's side was 15 to 20 feet away from McCaig.

The Camaro's front end turned to the left, the rear wheels continued to spin, and the back end went off the road. Deputy McCaig's headlights and flashing lights illuminated the Camaro's interior, and McCaig recognized defendant in the driver's seat. Defendant was wearing a baseball-type cap. He was frantically trying to gain control of the Camaro.[9]

Defendant regained control and drove into the hills at a high rate of speed. Deputy McCaig followed defendant and had to go 100 to 125 miles an hour to stay behind the Camaro. Defendant pulled away from McCaig and opened a considerable distance between them. McCaig lost traction in his own vehicle and had to discontinue the pursuit, which had lasted 10 to 15 minutes over 14.2 miles. Defendant was not apprehended that day.

Convictions

Based on this series of offenses, defendant was charged and convicted of:

Count VII: evading an officer in willful disregard for public safety on January 4, 2015 (Veh. Code, § 2800.2, subd. (a));

Count VIII: assault upon Deputy McCaig, during the pursuit on January 4, 2015 (Pen. Code, § 245, subd. (c)); and

[9] Deputy McCaig testified he had never met defendant. Prior to this pursuant, however, McCaig had attended a briefing where Deputy Benson showed what appeared to be defendant's booking photograph. At trial, McCaig testified there was no question in his mind that defendant was the driver of the Camaro.

Count IX: misdemeanor driving with a suspended license on January 4, 2015, with a prior conviction for driving under the influence (Veh. Code, § 14601.2, subd. (a)).[10]

PART V

FURTHER INVESTIGATION

Recovery of the Camaro and the Stolen Jewelry

At 7:51 a.m. on January 4, 2017, Deputy Egbert was dispatched to an address on Hetch Hetchy Court in Groveland on a report of a suspicious vehicle. Egbert discovered a blue Chevrolet Camaro parked there (license plate No. 6EKH446).

Deputy Egbert searched the Camaro and found a pill bottle in defendant's name. He also found a box and jewelry. He had the Camaro towed to the sheriff's department's investigations division.

Ms. Krischan later identified the box and the jewelry as the items that had been stolen from her bedroom.

Surveillance Video of Defendant with a Blue Camaro

At 6:00 p.m. on January 4, 2015, Deputy Donaldson went to the Miner's Mart gas station and watched surveillance video footage that was taken at approximately noon on January 3, 2015.

Deputy Donaldson testified the surveillance video showed a blue two-door Camaro coupe backing into the area of the fuel pumps, and defendant was pumping gasoline into the Camaro. Defendant had a ponytail and a beard, and he was wearing a hat that was flipped backwards. The video also showed defendant at the cash register

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[10] In issue III, *post*, we will address defendant's argument that the court improperly imposed consecutive sentences for count VII, evading Deputy McCaig, and count VIII, assault on McCaig during the pursuit, and the term for count VIII should be stayed pursuant to Penal Code section 654. Defendant asserts that he backed up the Camaro as part of evading McCaig and not for the separate purpose of assaulting him.

inside the convenience store, and then getting into the Camaro and driving away. The Camaro's license plate was not visible on the video.

On January 5, 2015, Deputy Donaldson interviewed Brittany Kauffman, the clerk at the Miner's Mart who was depicted in the January 3, 2015, surveillance video. She knew defendant and said he had been there and purchased gasoline.

Deputy Benson had pursued the blue Camaro on December 27, 2014. Benson testified he reviewed the photographs from the January 3, 2015, surveillance video taken at the Miner's Mart. Benson had multiple prior contacts with defendant and recognized defendant as the man with the ponytail, standing with the blue Camaro at the gasoline pumps. Benson did not show the photographs to Abbott, the civilian who had been in the pursuit with him, because Abbott said he would not be able to identify anyone from a photographic lineup.

Defendant's Arrest and Initial Statements

On January 7, 2015, Deputy Donaldson arrested defendant. Donaldson found a gold watch and several articles of jewelry in his pocket. Donaldson advised defendant of the *Miranda* warnings and defendant said he understood his rights.

As Deputy Donaldson drove him to the jail, defendant asked about the vehicle involved in the pursuit and whether he had any charges. Donaldson said defendant possibly faced assault and evasion charges, but Donaldson would have to speak with Deputy McCaig, the investigating officer for the January 4, 2015, pursuit.

Defendant asked if the charges were related to "the blue Camaro," and Donaldson said yes. Defendant was the first person to bring up the make and color of the car.

Defendant said he was not driving the car. Donaldson asked whether the vehicle belonged to him. Defendant said he owned the car, but it had been "lost" for several days. Donaldson asked what he meant. Defendant did not elaborate.

Donaldson asked defendant if he had a bill of sale for the car. Defendant said no, because he had not paid for it yet.

Defendant's Postarrest Interview

On January 8, 2015, Deputies McCaig and Benson interviewed defendant at the Tuolumne County Jail. Defendant was advised of the *Miranda* warnings and said he understood and would answer questions.

Defendant said he had been in the process of purchasing the blue Camaro, it had a V8 engine, and it was fast. Defendant said the car had been repossessed at least twice from the seller. Defendant did not identify the seller. Defendant said the car had gone back and forth within the last week and a half. Defendant was unable to answer questions about which days he had possessed the Camaro.

Defendant said he had not been involved " 'in any pursuits with the blue Camaro, I've only been involved in one vehicle pursuit as of recent.' " Deputy Benson asked defendant if that was the CHP pursuit (referring to Officer Griefer and the Mazda). Benson testified that defendant "kind of smiled and giggled," and said he would not "tell on himself or anyone else."

Deputy Robert Speers testified that in June 2015, the blue Camaro was located in the parking lot of the investigation unit at the sheriff's department. Deputy Speers located the registered owner and searched the vehicle prior to releasing it. He found a pill bottle connected to a red wire, hanging under the steering column area of the dashboard. The name "Lane" was on the pill bottle. A camouflage hat was also found in the car. He released the car to the registered owner in July 2015.

DEFENSE EVIDENCE

Defendant testified at trial that he did not commit any of the charged offenses. Defendant called several witnesses to support his alibi claims.

Defendant testified he was convicted of several felonies: burglary in 1983, escape with force or violence in 1990, residential burglary and receiving stolen property in 1994, and receiving stolen property in 1995.

Pursuit of the Mazda (Counts I–IV)

Defendant testified he lived at his mother's house in Jamestown. On August 22, 2014, the day that Officer Griefer pursued the Mazda, defendant was at his mother's house. He was chopping wood by hand with his brother, Mark, and friend, Joey Scialabba.

Defendant and Scialabba got into Mark's truck, and Mark drove them to the home of Scott Lane, defendant's other brother. They used Scott's gasoline-powered wood splitter.[11]

Later in the afternoon, Mark and Scialabba left Scott's house. Defendant stayed and kept using the wood splitter until it broke. Defendant called his friend Dale Arnold[12] and asked for a ride from Scott's house back to his mother's house. Arnold agreed and picked up defendant in a four-door maroon car.

As they headed to his mother's house, a white car pulled onto the road and almost hit Arnold's car. Arnold swerved to avoid a collision. Defendant testified the driver of the white car had a red bandana or red shirt around half his face.[13] Defendant testified an SUV with flashing lights, a CHP unit, and a Fish and Game car were behind the white car. Arnold testified a highway patrol vehicle with blinking lights came up "pretty fast."

Around 3:00 p.m., Arnold dropped defendant off at his mother's house. Defendant later returned to Scott's house.

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[11] Ms. DeCoster testified defendant had not been chopping wood on the property that day.

[12] Dale Arnold testified for defendant and admitted he had prior convictions for terrorist threats in 2007, failing to appear in 2016, and being a prohibited person in possession of ammunition in 2016. Arnold was in custody when he testified at defendant's trial for failure to appear.

[13] Defendant admitted that in a prior letter to the district attorney's office, he stated that he was stopped at a roadblock in Arnold's car when the white car was being pursued. Arnold testified there was no roadblock.

Defendant testified he was not driving the white car involved in the pursuit, but everybody in Groveland knew the driver's identity. He also testified that he knew who the driver was, but he would not identify that person.[14]

Defendant testified it was "impossible" for him to apologize to Dawn Miller for stealing the Mazda because "I didn't steal it, so I'm not going to say sorry for something I didn't do." Defendant denied that he signed over his truck to the Millers in exchange for damages to the Mazda. Defendant testified he was not hiding in a boat but admitted there was a verbal altercation with Dawn Miller about accusations that someone in his family stole the Mazda.

Defendant testified another member of his family stole the Mazda. He knew the thief's identity but refused to disclose the name.

Defendant denied making the postarrest statements attributed to him by Deputy Donaldson.

First Pursuit of the Camaro (Count V)

Defendant testified that he did not drive the blue Camaro on December 27, 2014. He did not know where he was that day, but he was probably at his mother's house.

Burglary and Theft of Ms. Krischan's Jewelry (Count VI)

Defendant testified he was probably at Ms. Krischan's house on January 3, 2015, and three or four other people were also there. He was not involved in stealing anything from Ms. Krischan, and "[s]he knows that, too." When Ms. Krischan called defendant about the stolen jewelry, defendant told her that he would "try to take care of it, yes,

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[14] Defendant testified that about two to three weeks after this incident, he received a citation in the mail and claimed it was from the district attorney's office. On cross-examination, he admitted the citation was from the CHP. Defendant testified he later forwarded the citation to the district attorney's office with a letter. It was stipulated that on September 12, 2014, defendant's letter was received by the district attorney's office. A clerk from the district attorney's office testified a complaint was filed in the superior court on November 25, 2014, but the district attorney's office never sent a letter and/or the citation to defendant.

because I remember who was at the house." He called "the people that were driving my vehicle" and tried to retrieve Ms. Krischan's stolen property.

Second Pursuit of the Camaro (Counts VII–IX)

Defendant testified that on January 3, 2015, he was at the Miner's Mart in the blue Camaro. Defendant admitted he was the person shown in the surveillance video, and the officers correctly identified him from that footage. Defendant then drove to his mother's house in the Camaro.

Defendant testified he never owned the blue Camaro but "had it a couple of times, two or three days at a time," between early December 2014 and January 3, 2015. "Everybody on the mountain was driving it, in Tuolumne City, it was just a community car." Defendant wanted to buy the Camaro, but he could never come up with the money. Defendant admitted he left an empty prescription bottle with his name on it inside the Camaro.

After he arrived at his mother's house, Dawn Murphy and "Doug," who used to live with her, drove away in the Camaro.

Defendant started a bonfire at his mother's house, sat around with Scialabba and Amber Lane, and they drank about 30 beers. Defendant had planned to drive somewhere that night, but Ms. Murphy and Doug did not return the Camaro. Defendant called his brother, Mark, in Carlsbad and asked if he could borrow the truck that he left at their mother's house. Mark apparently agreed, but defendant did not have the keys to the truck, so he was unable to leave.

On the morning of January 4, 2015, defendant was upset that the Camaro had not been returned. He went to David Creekmore's residence, which was about 200 yards from his mother's house. Creekmore and defendant spent the entire day looking around Groveland for the Camaro but never found it.

Mark testified he first saw the blue Camaro in late December 2014. He had seen defendant driving the Camaro and also saw other people, including Dawn Murphy and "a

scraggly looking guy," driving the Camaro. On one occasion, Ms. Murphy was driving the Camaro, and the passenger looked like defendant.

Scialabba testified he had seen Ms. Murphy and a "scraggly looking guy" drive the blue Camaro once or twice. Amber Lane testified that she had seen Ms. Murphy drive the blue Camaro, and that she could not recall seeing defendant drive the vehicle.

Defense Expert

Dr. Deborah Davis testified as an expert witness in the field of eyewitness identification and memory and testified about the factors that undermined the reliability of eyewitness identifications, and that led to wrongful convictions.

REBUTTAL

The prosecution called Dennis Raymond, the defense investigator, who testified about his interviews with Mark Lane, Amber Lane, and Joey Scialabba in May 2015. Mark and Scialabba said a few other people had driven the Camaro. Mark said the drivers included Dawn Murphy, and a "blond-haired kid" named "Robert" who had left the area. Scialabba said defendant had the car for short periods of time and then other people had it. Neither Mark nor Scialabba said any of the other drivers looked like defendant, or that a scraggly-looking man drove it. Amber told the investigator she had seen defendant and Dawn Murphy driving the Camaro.

SURREBUTTAL

The defense recalled Officer Griefer, who testified Dawn Miller tried to contact him on the evening of August 22, 2014, but he was either out of range or on another call. Around 9:30 p.m., Officer Griefer spoke with Ms. Miller, and she said someone called her and said they were on their way to pick up the stolen Mazda.

Officer Griefer testified that a few weeks after the pursuit of the Mazda, Ms. Miller told him that defendant apologized for taking the car and gave her a written letter to sign over his truck to pay for the damages. Officer Griefer never saw the letter, and he did not make a report or a recording of this conversation with Ms. Miller. Officer Griefer

did not prepare a report of the conversation until two years later, just before trial, when he told the district attorney about it.

CONVICTIONS AND SENTENCE

As set forth above, defendant was convicted of all charges.

The court imposed an aggregate second strike term of 27 years as follows. The court selected count VI, first degree residential burglary, as the principal term and imposed the upper term of six years, doubled to 12 years as the second strike term, plus a consecutive term of five years for the prior serious felony enhancement (Pen. Code, § 667, subd. (a)).

The court imposed consecutive sentences for the subordinate terms (representing one-third the midterms) of eight months, doubled to 16 months, for each of count I, unlawfully taking or driving the Mazda (Veh. Code, § 10851, subd. (a)); count II, evading an officer in willful disregard for public safety during the pursuit of the Mazda (Veh. Code, § 2800.2, subd. (a)); count V, evading an officer in willful disregard for public safety, based on Deputy Benson's pursuit of the Camaro on December 27, 2014; and count VII, evading an officer in willful disregard for public safety, based on Deputy McCaig's pursuit of the Camaro on January 4, 2015; and a consecutive term of one year four months (one-third the midterm), doubled to two years eight months as the subordinate term in count VIII, assault upon a police officer, Deputy McCaig, when defendant backed the Camaro into the patrol car while McCaig was in it (Pen. Code, § 245, subd. (c)); and two consecutive one-year terms for the two prior prison term enhancements.

The court imposed and stayed the terms pursuant to Penal Code section 654 for count III, evading a police officer driving against traffic, during Officer Griefer's pursuit of the Mazda on August 22, 2014 (Veh. Code, § 2800.4); count IV, misdemeanor driving with a suspended license on August 22, 2014, with a prior conviction for driving under the influence (Veh. Code, § 14601.2, subd. (a)); and count IX, misdemeanor driving with

a suspended license on January 4, 2015, with a prior conviction for driving under the influence (Veh. Code, § 14601.2, subd. (a)).

DISCUSSION

I. Defendant's Felony Conviction Must be Reduced to a Misdemeanor

In count I, defendant was charged and convicted of felony unlawful driving or taking of a vehicle, the Mazda Protégé belonging to Ms. Albanez. (Veh. Code, § 10851, subd. (a)). Defendant argues the sentencing provisions of Proposition 47 and Penal Code section 490.2 apply to this conviction because he could have been convicted of count I based on either the theft of the Mazda or the posttheft driving of the vehicle. Defendant further argues that his felony conviction must be reduced to a misdemeanor since the jury was not instructed and did not find beyond a reasonable doubt that the value of the stolen vehicle exceeded $950.

We begin with the applicable law and then review the record to address defendant's contentions.

A. Vehicle Code Section 10851

Defendant was charged and convicted in count I with violating Vehicle Code section 10851, subdivision (a), based on the first incident in this case involving Ms. Albanez's stolen Mazda. The statute states:

> "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle ... is guilty of a public offense ...." (Italics added.)

Vehicle Code section 10851, subdivision (a) " 'proscribes a wide range of conduct' " (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*)) and "its prohibitions sweep more broadly than 'theft,' as the term is traditionally understood." (*People v. Page* (2017) 3 Cal.5th 1175, 1182 (*Page*).)

"A person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*Garza, supra,* 35 Cal.4th at p. 876.)

> "Unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction and may not also be convicted under [Penal Code] section 496(a) of receiving the same vehicle as stolen property. On the other hand, unlawful *driving* of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete (for convenience, we will refer to this as 'posttheft driving'). Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction and does not preclude a conviction under [Penal Code] section 496(a) for receiving the same vehicle as stolen property." (*Id.* at p. 871.)

"[I]f the defendant was convicted under Vehicle Code section 10851, subdivision (a), of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession, he has, in fact, 'suffered a theft conviction.' [Citation.]" (*Page, supra,* 3 Cal.5th at p. 1183.)

"Thus, a defendant who steals a vehicle and then continues to drive it after the theft is complete commits separate and distinct violations of section 10851(a)." (*Garza, supra,* 35 Cal.4th at p. 880.) *Garza* noted previous cases found that "a taking is complete when the driving is no longer part of a ' "continuous journey away from the *locus* of the theft." ' [Citation.] One might also suggest that the taking is complete when the taker reaches a place of temporary safety. [Citation.] Whatever the precise demarcation point may be …, once a person who has stolen a car has passed that point, further driving of the vehicle is a separate violation of section 10851(a) that is properly regarded as a nontheft offense …." (*Id*. at pp. 880–881.)

Vehicle Code section 10851, subdivision (a) is a "wobbler" offense that may be punished as either a felony or a misdemeanor. (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 853 (*Gutierrez*).)

B. Proposition 47

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

"Proposition 47 also created a new resentencing provision: [Penal Code] section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.]" (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1092.) When such a petition has been filed, the defendant bears the burden of proving he or she is eligible for retrospective relief. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 855.)

Penal Code section 1170.18 does not identify Vehicle Code section 10851 as one of the code sections amended or modified by Proposition 47. (Pen. Code, § 1170.18.) As relevant to this case, however, it added section 490.2 to the Penal Code, which states:

> "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor." (Pen. Code, § 490.2, subd. (a).)

C. Page, Gutierrez, and Lara

"Following passage of Proposition 47, Courts of Appeal disagreed whether Penal Code section 490.2 applied to vehicle theft under Vehicle Code section 10851, that is,

whether a theft conviction under Vehicle Code section 10851 could continue to be punished as a felony regardless of the value of the vehicle or whether it must be punished as a misdemeanor if the vehicle's value did not exceed $950." (*Gutierrez, supra*, 20 Cal.App.5th at p. 854.)

In *Page, supra*, 3 Cal.5th 1175, the California Supreme Court resolved this disagreement in a case where the defendant had already been convicted and sentenced for a felony violation of Vehicle Code section 10851. After passage of Proposition 47, he filed a petition for resentencing under Penal Code section 1170.18 and argued his felony offense should be modified to a misdemeanor. The superior court denied the petition and found Proposition 47 did not affect punishment under Vehicle Code section 10851. (*Id.* at p. 1180.)

Page reached the contrary conclusion and held that a defendant convicted of violating Vehicle Code section 10851 was not "categorically ineligible for resentencing under Proposition 47." (*Page, supra*, 3 Cal.5th at p. 1180.)

> "Penal Code section 1170.18 … does not expressly refer to Vehicle Code section 10851, but it does permit resentencing to a misdemeanor under Penal Code section 490.2 … for theft of property worth $950 or less. As this court has previously explained, Vehicle Code section 10851 may be violated in several ways, including by theft of the vehicle. [Citation.] A person convicted before Proposition 47's passage for vehicle theft under Vehicle Code section 10851 may therefore be resentenced under section 1170.18 if the person can show the vehicle was worth $950 or less." (*Id.* at p. 1180.)

Page held that since Vehicle Code section 10851, subdivision (a) could be violated by either the theft of a car or posttheft driving, certain violations could be reduced to misdemeanors by Proposition 47. (*Page, supra*, 3 Cal.5th at p. 1183.)

> "By its terms, Proposition 47's new petty theft provision, [Penal Code] section 490.2, covers the theft form of the Vehicle Code section 10851 offense. As noted, section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950. An automobile is

> personal property. 'As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' [Citation.]" (*Ibid*.)

Page clarified that Proposition 47 only extended to a conviction of Vehicle Code section 10851, subdivision (a) that was based on the theft of the vehicle:

> "As we explained in *Garza* … '[A] defendant convicted under section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession' has been convicted of stealing the vehicle. It follows that Proposition 47 makes some, though not all, section 10851 defendants eligible for resentencing: a defendant convicted and serving a felony sentence under Vehicle Code section 10851, subdivision (a), for vehicle theft – taking a vehicle with the intent to permanently deprive the owner of possession – could (if the vehicle was worth $950 or less) receive only misdemeanor punishment pursuant to [Penal Code] section 490.2 and is thus eligible for resentencing under section 1170.18." (*Page*, *supra*, 3 Cal.5th at p. 1184.)

While Vehicle Code section 10851, subdivision (a) did not expressly designate the offense as a theft, "the conduct it criminalizes includes theft of a vehicle…. And to the extent vehicle theft is punished as a felony under [Vehicle Code] section 10851, it is, in effect, a form of grand, rather than petty, theft. [Citations.]" (*Page*, *supra*, at p. 1186.)

> "[W]e conclude that obtaining an automobile worth $950 or less by theft constitutes petty theft under [Penal Code] section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged. A defendant who, at the time of Proposition 47's passage, was serving a felony sentence for taking or driving a vehicle in violation of Vehicle Code section 10851 is therefore eligible for resentencing under [Penal Code] section 1170.18, subdivision (a), if the vehicle was worth $950 or less and the sentence was imposed for theft of the vehicle." (*Id*. at p. 1187.)

As for the defendant's petition for resentencing in that case, *Page* held the superior court properly denied it because defendant provided no information for the basis of his conviction, whether he was convicted for theft or posttheft driving of the vehicle, or if the vehicle was worth $950 or less. However, *Page* held the court's denial of defendant's

petition should have been without prejudice and he could file a new petition. (*Page*, *supra*, 3 Cal.5th at p. 1180.)

In *Gutierrez*, *supra*, 20 Cal.App.5th 847, the defendant was convicted after a jury trial of a felony violation of Vehicle Code section 10851, subdivision (a), based on an offense that he committed after Proposition 47 was enacted. In his direct appeal after conviction and sentence, the defendant relied on *Page* and argued his felony conviction should be reduced to a misdemeanor under Proposition 47 because there was no evidence the vehicle's value was at least $950. (*Gutierrez*, at pp. 849, 853, 855.)

Gutierrez acknowledged the two types of offenses defined within Vehicle Code section 10851, subdivision (a), as set forth in *Page* and *Garza* – taking the vehicle with intent to permanently deprive the owner of possession, a form of theft; and posttheft driving, which was not a form of theft. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 854.)

Gutierrez held that a defendant who was tried for violating Vehicle Code section 10851, subdivision (a) was potentially eligible for the benefit of Proposition 47's reclassification of the theft aspect of the offense if the jury was properly instructed on the valuation element:

> "Although the record cannot support a guilty verdict for felony vehicle theft, the problem with [defendant's] felony conviction is not the sufficiency of the evidence *but jury instructions that failed to adequately distinguish among, and separately define the elements for, each of the ways in which [Vehicle Code] section 10851 can be violated*. As *Page* made clear, when a violation of [Vehicle Code] section 10851 is 'based on theft,' a defendant can be convicted of a felony only if the vehicle was worth more than $950. [Citation.] It is also necessary to prove the vehicle was taken with an intent to permanently deprive the owner of its possession – 'a taking with intent to steal the property.' [Citation.] *The court's instructions in this case included neither of those essential elements for a felony theft conviction*." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 856, italics added, fn. omitted.)

Gutierrez noted that in closing argument at the defendant's trial, the prosecutor relied on evidence that showed the defendant took and drove the vehicle without consent.

Gutierrez further noted the jury was instructed on the elements of the offense with the pattern version of CALCRIM No. 1820, which did not state that for the taking aspect of the offense, the vehicle's value had to be $950 or more for the felony violation. (*Gutierrez, supra*, 20 Cal.App.5th at pp. 851–852.) The incomplete instruction allowed the jury to convict defendant "of a felony violation of [Vehicle Code] section 10851 for stealing the … car, even though no value was proved – a legally incorrect theory – or for a nontheft taking or driving offense – a legally correct one." (*Id*. at p. 856.)

> " 'When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.' [Citations.] 'An instruction on an invalid theory may be found harmless when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary" under a legally valid theory.' [Citation.]" (*Id.* at p. 857.)

Gutierrez concluded that based on the instructional error, defendant's felony conviction for violating Vehicle Code section 10851 could not stand because the court could not determine whether the defendant was convicted "under a legally valid nontheft theory or a legally invalid theory of vehicle theft that did not include as an element the value of the stolen car." (*Gutierrez, supra*, 20 Cal.App.5th at p. 857.)

As we will further discuss below, *Gutierrez* concluded it was compelled to reverse the felony conviction because of the instructional error and remanded the matter to allow the People to either accept a reduction of the conviction to a misdemeanor or retry the offense as a felony with appropriate instructions. (*Gutierrez, supra*, 20 Cal.App.5th at p. 857.)[15]

In *People v. Lara* (2019) 6 Cal.5th 1128 (*Lara*), the defendant was alleged to have committed acts that violated Vehicle Code section 10851, subdivision (a), prior to the enactment of Proposition 47. He was tried, convicted of a felony violation, and

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[15] A petition for review was not filed in *Gutierrez*.

sentenced after the effective date of Proposition 47. In his direct appeal, he argued that his felony conviction had to be reduced to a misdemeanor pursuant to *Page* and Proposition 47. (*Lara*, at pp. 1131–1132.)

Lara held that "defendants who committed theft crimes *before* the effective date of Proposition 47, but who are tried or sentenced *after* the measure's effective date, are entitled to initial sentencing under Proposition 47, and need not invoke the resentencing procedure set out in [Penal Code] section 1170.18." (*Lara*, *supra*, 6 Cal.5th at pp. 1133–1134, italics added.)

The defendant in *Lara* "had not been sentenced – indeed, he had not yet been charged – when Proposition 47 became effective. By its terms, then, the resentencing provision in [Penal Code] section 1170.18 does not apply to him. Proposition 47 provides resentencing relief to one 'who, on November 5, 2014, was serving a sentence' for an offense eligible for reduction ([Pen. Code], § 1170.18, subd. (a)), but it does not expressly address reduction of punishment for a defendant who had not yet been sentenced on its effective date. On the contrary, Proposition 47's resentencing provisions are simply silent on the subject of retroactivity as to such a defendant. In the absence of contrary indications, we may therefore presume … that the enacting body intended Proposition 47's reduced penalties to apply in this category of nonfinal cases. [¶] We therefore agree with the parties that the applicable ameliorative provisions of Proposition 47 (here, Pen. Code, § 490.2) apply directly in trial and sentencing proceedings held after the measure's effective date, *regardless of whether the alleged offense occurred before or after that date*." (*Lara, supra*, 6 Cal.5th at p. 1135, italics added.)

Lara, however, concluded the ameliorative provisions of Proposition 47 did not make a difference in the defendant's case. (*Lara, supra*, 6 Cal.5th at pp. 1135, 1137.) The jury was only instructed on an unlawful driving theory, and not on the theft aspect of Vehicle Code section 10851. The verdict form also restricted the theory of guilt only for driving a vehicle without permission. (*Lara*, at p. 1137.)

> "Although no evidence was presented of the vehicle's value, the evidence amply supported a theory of posttheft driving, which does not require proof of vehicle value in order to be treated as a felony. The evidence showed that defendant was apprehended driving the stolen car six or seven days after it was taken from its owner. Whether or not he was involved in the theft – a point the prosecutor conceded was not proved at trial – the evidence clearly establishes a substantial break between the theft and defendant's act of unlawful driving. [Citation.] Defendant did not have the owner's consent to drive the vehicle and the circumstances indicated he intended to keep the car from the owner for some period of time. The evidence was thus sufficient to show a felony violation of Vehicle Code section 10851." (*Ibid*.)

Lara acknowledged that while the instruction specified driving as the alleged illegal act, it did not refer to "posttheft driving," and the jury could have theoretically understood guilt to be proved if the defendant stole the vehicle by driving it away from where the owner parked it. *Lara* found the instructional omission harmless because the defendant was apprehended driving the vehicle six or seven days after it was stolen, "a time gap that indisputably qualifies as a ' "substantial break" ' between the theft and the driving. [Citation.]" (*Lara*, *supra*, 6 Cal.5th at p. 1138.)

D. The Charge and the Trial Evidence

With this background in mind, we turn to the record leading to defendant's felony conviction in this case for violating Vehicle Code section 10851, subdivision (a), and his argument that his felony conviction was based on the "theft" aspect of the offense, the jury was not properly instructed on the elements of the offense, and his felony conviction must be reduced to a misdemeanor pursuant to *Page*, *Gutierrez*, and *Lara*.

Defendant was charged in count I with committing a felony violation of Vehicle Code section 10851, subdivision (a) on August 22, 2014, "unlawful driving or taking of a vehicle." The information alleged that he "did unlawfully drive and take a certain vehicle, to wit, 1996 Mazda Protégé, then and there the personal property of Andria Albanez without the consent of and with the intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle."

At trial, the prosecution introduced substantial evidence that defendant was driving the stolen Mazda during the lengthy pursuit, based on the stipulation that Ms. Albanez's Mazda had been taken from the yard at Miller Brothers without her permission, she did not know defendant, Officer Griefer's identification of defendant as the driver of the Mazda, defendant's statements to Ms. DeCoster that the police were chasing him, and the inferences from his postarrest statements to Deputy Donaldson about the pursuit.

The prosecution also introduced evidence that defendant was the person who stole the Mazda from Miller Brothers. Dawn Miller testified that after she found defendant and the Mazda at Ms. DeCoster's residence, defendant "apologized for stealing it," referring to the Mazda. Defendant "apologized several times for hours while we were waiting for the sheriffs to arrive." Ms. Miller testified that at the time of this incident, defendant's truck was already in their shop for repairs.

> "Q. But the defendant apologized to you for stealing that car?
>
> "A. Yeah. He hand wrote me out a bill of sale for his truck, basically giving it to us in lieu of the damages that he did to that vehicle when he stole it."

When defendant testified at trial, he denied that he was driving the Mazda during the pursuit. He also denied that he apologized to Ms. Miller. Defendant testified it was "impossible" for him to apologize to Dawn Miller for stealing the Mazda because "I didn't steal it, so I'm not going to say sorry for something I didn't do."

E. The Instructions

As to the elements of count I, the court instructed the jury with the pattern version of CALCRIM No. 1820 as follows.

> "The defendant is charged in Count 1 with unlawfully *taking or driving* a vehicle in violation of Vehicle Code section 10851. To prove that the defendant is guilty of this crime, the People must prove that one, the defendant *took or drove* someone else's vehicle without the owner's

consent; and two, when the defendant did so, he intended to deprive … the owner of possession or ownership of the vehicle for any period of time. A taking requires that the vehicle be moved for any distance, no matter how small." (Italics added.)

The court advised the parties that it gave this instruction because it "is the vehicle theft charge and it does say 'unlawful taking or driving of a vehicle.' " The jury was not instructed on any lesser included offenses for count I, or whether the vehicle had to be a certain value. There were no objections to the instruction.

F. The Parties' Arguments

In closing argument, the prosecutor addressed the multiple charges by dividing them into four separate incidents. The first incident was based on Officer Griefer's pursuit of the white Mazda which had been taken from the Miller Brothers' yard. The prosecutor reminded the jury that at one point during the pursuit, the Mazda was within three feet of Officer Griefer and he recognized defendant as the driver. When the officers contacted Ms. DeCoster, she said defendant had been there and said he needed to lie down because the police were after him. Ms. Miller later received a call to retrieve the Mazda from the same property.

The prosecutor also addressed Ms. Miller's testimony about defendant's admission he stole the Mazda:

"[Ms. Miller] says that she found the defendant actually hiding there in a boat, and that *he apologized to her for stealing the Mazda*; and that he actually signed over his truck that was at the Miller Brothers Automotive to pay for the damages because … she paid Ms. Albanez for that vehicle because it was supposed to be under her care and custody when it was stolen." (Italics added.)

The prosecutor then addressed the elements of count I:

"So for unlawful *taking or driving* of a vehicle, I have to prove two counts. Defendant took or drove someone else's vehicle without the owner's consent. Well, we have a stipulation that the defendant didn't know the owner and didn't have consent to drive that vehicle. And Count 2 is when the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time.

> "So basically, if you don't have permission to drive a vehicle, and you drive it, that's an unlawful taking or drive the vehicle, okay. So that's been proved."[16] (Italics added.)

The prosecutor argued that when Ms. Miller found the Mazda on the property of defendant's brother, defendant apologized to her "for taking the Mazda. So we've got the unlawful driving or taking right there and he signs over his vehicle that's at Miller Brothers Automotive for the damages because she has to subsume that vehicle now because of theft."

In his argument, defense counsel challenged the reliability of Officer Griefer's identification of defendant as the driver of the Mazda. Counsel also challenged the veracity of Ms. Miller's claim that defendant admitted he took the Mazda.

The jury found defendant guilty in count I, as stated in the verdict form, of violating Vehicle Code section 10861, subdivision (a), "Unlawful Driving Or Taking Of A Vehicle" as charged in the information. The verdict form did not specify whether the conviction was based on taking or driving the Mazda.

G. Reversal of Defendant's Felony Conviction

The People concede that *Page* extended Proposition 47 to certain theft violations of Vehicle Code section 10851, subdivision (a). However, the People assert Proposition 47 does not apply in this case because "there can be no reasonable doubt" the jury convicted defendant of violating section 10851 based only on the evidence of his posttheft driving during Officer Griefer's pursuit rather than the theft of the Mazda. The People assert defendant never disputed that someone led Griefer on the high-speed pursuit, and his defense theory was that he was not the person who was driving the Mazda. The People conclude that the jury rejected defendant's trial testimony since it

[16] The prosecutor referred to having to prove "two counts" but apparently meant two elements for count I.

convicted defendant of the felony violation of Vehicle Code section 10851, and thus relied on a legally correct theory.

The entirety of the record refutes the People's argument. First, as in *Lara*, defendant is entitled to the ameliorative benefits of Proposition 47, including the definitions of grand and petty theft contained in Penal Code section 490.2, even though he committed the charged offense prior to the enactment of Proposition 47, because he was convicted and sentenced after the effective date. He is further entitled to raise this issue in his direct appeal from that conviction and is not required to file a petition for resentencing under Penal Code section 1170.18.

As in *Page* and *Gutierrez*, defendant was convicted of a felony offense that has been reduced to a misdemeanor under Proposition 47. The third amended information alleged defendant violated Vehicle Code section 10851, subdivision (a) by unlawfully taking *or* driving Ms. Albanez's Mazda. There was overwhelming evidence defendant was driving the stolen Mazda on August 22, 2014. There was also evidence that defendant admitted that he stole the Mazda when he spoke to Ms. Miller. In addition, there was no evidence as to when Mazda was stolen from the yard at Miller Brothers, so it is impossible to determine whether there was a substantial break between the taking and the driving of the Mazda. The prosecutor relied on evidence of both taking and driving in her closing argument to assert that the jury should convict defendant of this charge. The jury herein was instructed with the pattern version of CALCRIM No. 1820, that defined the offense as either "taking *or* driving" with the requisite intent. (Italics added.) The instruction did not state that for a felony violation based on the taking aspect of the crime, the value of the vehicle had to be $950 or over.[17]

[17] In September 2018, CALCRIM No. 1820 was revised to add as an element to the offense of "taking" under Vehicle Code section 10851, subdivision (a), that the vehicle was worth more than $950.

As in *Gutierrez*, we cannot say whether defendant was convicted "under a legally valid nontheft theory or a legally invalid theory of vehicle theft that did not include as an element the value of the stolen car" since the jury was not correctly instructed. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.) As a result, defendant's conviction for the felony violation of section 10851 cannot stand. (*People v. Jackson* (2018) 26 Cal.App.5th 371, 379–380; *Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.)[18]

H. Remand

While defendant's felony conviction must be reversed, we must determine the appropriate disposition.

This court addressed a similar question in *In re D.N.* (2018) 19 Cal.App.5th 898 (*D.N.*), where an officer stopped a vehicle suspected of being connected to a burglary. An adult male was driving the car, and a juvenile female was the passenger. The vehicle belonged to the juvenile's mother. The juvenile admitted taking her mother's vehicle without her permission or knowledge. Some of the property taken during the burglary was found in the juvenile's home. (*Id.* at pp. 900–901.) A petition was filed that alleged the juvenile committed two felonies: residential burglary and "theft of a vehicle" in violation of Vehicle Code section 10851. (*Id.* at p. 900.) At the contested hearing, the

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[18] In *People v. Orozco* (2018) 24 Cal.App.5th 667, review granted August 15, 2018, S249495, the defendant pleaded guilty to one count of unlawfully driving a vehicle of another without permission (Veh. Code, § 10851, subd. (a)), and one count of receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)). After the enactment of Proposition 47, defendant filed a petition for resentencing and it was denied. *Orozco* affirmed the denial without prejudice to filing a subsequent petition providing evidence of eligibility under section Vehicle Code section 10851 but held Proposition 47 did not extend to receiving a stolen vehicle. The California Supreme Court granted review.

In People v. Bussey (2018) 24 Cal.App.5th 1056, review granted September 12, 2018, S250152, the court held the jury could have based the defendant's conviction for a felony violation of Vehicle Code section 10851 on taking a vehicle and followed *Gutierrez* in reversing the felony; the court further held the defendant's conviction for receiving a stolen vehicle was not subject to Proposition 47. The California Supreme Court granted review in *Bussey* in light of the issue pending in *Orozco*.

juvenile testified her mother gave permission for the adult male to borrow the car, she did not take or drive it, and she denied any involvement in the burglary. The People did not introduce any evidence about the value of the vehicle. The court found both allegations true. (*Ibid.*)

D.N. relied on *Page* and held the court's finding that the juvenile committed a felony violation of Vehicle Code section 10851 was improper under Proposition 47 because the prosecutor failed to prove the value of the vehicle exceeded $950. (*D.N.*, *supra*, 19 Cal.App.5th at pp. 900, 901.)

As for the disposition, *D.N.* reduced the juvenile's felony adjudication to a misdemeanor violation of Vehicle Code section 10851. In doing so, *D.N.* rejected the People's request to remand the matter for another evidentiary hearing to prove the value of the stolen vehicle. *D.N.* held such a remand would violate double jeopardy principles since "Penal Code section 490.2 was the law of this state for nearly two years prior to [the juvenile's] offense, and for more than two years at the time of the jurisdiction hearing,…" (*D.N.*, *supra*, 19 Cal.App.5th at p. 900.)

> "The flaw in the People's argument for a remand on the value of the stolen vehicle is that the law changed nearly two years before [the juvenile] committed her offenses, and over two years from the date of the contested jurisdiction hearing. Proposition 47 and Penal Code section 490.2 were effective on November 5, 2014. [Citation.] Penal Code section 490.2 mandated proof of value in excess of $950 for theft of property to constitute a felony. The prospective aspect of this change in the law applied to all offenses occurring on November 5, 2014, and thereafter. [Citations.]
>
> "The People were thus on notice as of November 5, 2014, that vehicle theft under Vehicle Code section 10851 was to be a misdemeanor unless the value of the stolen vehicle exceeded $950. [T]here were conflicting published opinions from Courts of Appeal concerning whether Proposition 47 and Penal Code section 490.2 applied to Vehicle Code section 10851 thefts. The Supreme Court granted review on two cases with conflicting holdings … many months before [the juvenile's] adjudication hearing.

> "The People should have been well aware the value of the stolen vehicle was relevant to whether the offense was a felony. The People chose instead to gamble, and lost their bet, that the Supreme Court would find Vehicle Code section 10851 outside the ambit of Proposition 47 and Penal Code section 490.2…. Penal Code section 490.2 had been the law for more than two years prior to [the juvenile's] jurisdiction hearing. The People were on notice of the relevant change in the law and are not, therefore, entitled to retry [the juvenile] to prove the value of the stolen vehicle. To permit retrial on this point would violate double jeopardy. [Citations.]" (*Id.* at pp. 903–904, fn. omitted.)

Gutierrez involved a different procedural background. The defendant was charged and convicted of multiple felonies, including "driving or taking a vehicle" in violation of section 10851. As explained above, *Gutierrez* reversed the defendant's felony conviction because the jury was instructed on both a legally correct theory (based on driving) and a legally incorrect theory (based on theft but failing to instruct on or prove the value of the car), there was evidence to support both theories, and it was impossible to determine which theory the jury relied on to convict the defendant of the felony violation of section 10851. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.)

Gutierrez held that it would reverse the defendant's felony conviction and remand the matter to allow the People to either accept a reduction of the conviction to a misdemeanor or retry the offense as a felony with the correct instructions. (*Gutierrez*, *supra*, 20 Cal.App.5th at pp. 857, 858.) In doing so, *Gutierrez* acknowledged that *D.N.* found the People were on notice about Proposition 47 and should have been "well aware" based on existing appellate opinions that the value of the stolen vehicle was relevant about whether the offense was a felony. *Gutierrez* disagreed because that at the time of the trial in that case, "three then-published decisions had held Proposition 47 did not apply to [Vehicle Code] section 10851 and only one had held it did." (*Gutierrez*, at p. 858, fn. 11.) While the California Supreme Court had granted review in those cases, given "the prevailing decisions in the Courts of Appeal at the time of Gutierrez's trial, we decline to fault either the trial court or the prosecutor for failing to correctly anticipate the

outcome of cases pending before the Supreme Court. This is not an instance where either the court or the prosecutor misinterpreted or failed to follow established law. [T]he appropriate remedy for the error here is to allow a retrial on the felony charge if the People can in good faith bring such a case." (*Id*. at p. 858, fn. omitted.)[19]

I. Analysis

We believe the appropriate disposition in this case is to remand the matter as in *Gutierrez*. Defendant was charged with taking or driving the vehicle, there was evidence to show he both stole and drove the car, and the prosecutor cited to this evidence in closing argument. It is impossible to determine which theory the jury relied upon to convict defendant of the felony violation of Vehicle Code section 10851 because of the instructional error since the jury was instructed on both taking and driving, but it was not instructed on the element of valuation for the purposes of the taking aspect of the statute. If the jury had been so instructed, then defendant's conviction would have been based on driving since the People failed to introduce evidence about the value of the car.

Aside from the question of whether the People should have been aware of the potential change in the law, we do not find the same double jeopardy situation exists in this case as in *D.N*. and find the procedural aspects of these cases are distinguishable. *D.N.* involved a juvenile disposition for "theft of a vehicle" in violation of Vehicle Code section 10851, where there was a failure of proof about the value of the car. (*D.N.*, *supra*, 19 Cal.App.5th at p. 900.) In contrast to *Gutierrez* and the instant case, there is no indication the juvenile in *D.N.* was alleged to have violated Vehicle Code section 10851

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[19] In *In re J.R*. (2018) 22 Cal.App.5th 805, review granted August 15, 2018, S249205, the court relied on *Page* and reversed a minor's felony disposition for violating Vehicle Code section 10851, and agreed with *Gutierrez* that the matter should be remanded for a new evidentiary hearing because "even assuming prosecutors were on notice of the potential relevance of vehicle valuation evidence at the time of D.N.'s adjudication, that was not the case a year earlier at the time of the minor's adjudication" in *J.R.* (*In re J.R.*, at p. 822.)

by either "taking or driving" the vehicle, and the evidence only showed she took the car and did not drive it. The matter was heard by the juvenile court and not by a jury, so there was no instructional error that allowed a finding under either the taking or driving aspects of the statute, and there is no indication that the People relied on evidence of both taking and driving to argue the allegation was true.

Based on the procedural circumstances of this case, we reverse defendant's felony conviction based on the instructional error and vacate the sentence imposed. The matter is remanded for further proceedings, where the People may either accept a reduction of the charged offense in count I to a misdemeanor with the court to resentence defendant accordingly or retry defendant for a felony violation since the reversal resulted from an instructional error and does not implicate principles of double jeopardy.

II. The Court Properly Denied Defendant's Motion for Judgment of Acquittal of the Burglary Charge

In count VI, defendant was charged and convicted of first degree residential burglary of Ms. Krischan's house. On appeal, he argues the court should have granted the motion he made when the People rested, for judgment of acquittal of count VI because of insufficient evidence that he committed the burglary either as the perpetrator or an aider and abettor. Defendant's arguments are based on Ms. Krischan's trial testimony, where she expressed doubt that he was involved in the burglary and theft.

A. Ms. Krischan's Trial Testimony

As set forth above, Ms. Krischan testified that on January 4, 2015, she met with Deputy Egbert and reported the burglary of her bedroom and theft of her jewelry. She was angry and told Deputy Egbert that she believed defendant took the jewelry. Ms. Krischan could not recall if she told Deputy Egbert that Ms. Murphy had been at the house.

On cross-examination, Ms. Krischan testified about who she believed took the jewelry:

"[DEFENSE COUNSEL]. Would it be fair to say that you don't think [defendant] burglarized your house?

"A. Yes, sir, that would be fair to say.

"Q. In fact, the reason you hold him responsible is that he brought over Dawn Murphy who you think burglarized your house?

"A. Correct."

Ms. Krischan also testified about her prior statement to Deputy Egbert:

"[DEFENSE COUNSEL]. [W]hen you talked to Deputy Egbert … you were upset about being ripped off?

"A. Yes, I was victimized.

"Q. You wanted to blame somebody so you blamed [defendant], right?

"A. Yes, I did.

"Q. But you, at that time or the day later, said, 'Hey, he really didn't do it.'?

"A. I don't know, I wasn't home, but yes, I did say that.

"[¶] … [¶]

"Q. [T]o this day, do you believe [defendant] ripped you off?

"A. I would like to hope he wouldn't, yes.

"Q. Okay. Now, do you really believe that Dawn Murphy is the one that burglarized your house?

"A. Yes, I do."

Also, at trial, Ms. Krischan testified she was aware that her jewelry was later found inside the blue Camaro.

"[DEFENSE COUNSEL]. And it very well could have been the fact that [defendant] got the stuff, he just couldn't get it back to you; is that right?

"A. Yes.

"[¶] … [¶]

"Q. [T]o this day, do you believe [defendant] ripped you off?

"A. I don't know.

"Q. Well, at the time you said you didn't think he ripped you off?

"A. I would like to hope he wouldn't, yes.

"Q. Okay. Now, you really believe that Dawn Murphy is the one that burglarized your house?

"A. Yes, I do."

On redirect examination, Ms. Krischan testified that at some point after the jewelry was taken, she was taken into custody, and Ms. Murphy moved into her house at that time. As of the time of trial, they were living together but Ms. Krischan did not like Ms. Murphy. Ms. Krischan never had any problems with defendant until Ms. Murphy appeared.

"[THE PROSECUTOR]: So when you called him and accused him of a crime that now you're telling us that you're not sure if he committed or not, when he denied it, he was upset?

"A. Yes.

"Q. So you could hear in his voice that he was upset that you were accusing him of something?

"A. Yes."

B. The Unavailability of Deputy Egbert

As the prosecutor ended her case-in-chief, she advised the court that Deputy Egbert, one of the investigating officers, had been subpoenaed but he was not available to testify because he had been called to military duty at Camp Roberts. The prosecutor stated that Deputy Egbert could not be reached, and the Army would not release him.

The prosecutor said she was otherwise finished with her case. The court asked for an offer of proof for Deputy Egbert's proposed testimony. The prosecutor said Egbert interviewed Ms. Krischan and recorded her initial statement about the burglary and

jewelry theft, and her statements to Egbert were different from her trial testimony. Egbert was also the officer who recovered the blue Camaro, he searched the car, and he found Ms. Krischan's jewelry and a prescription bottle in defendant's name.

The prosecutor requested to "close" her case, but she would not "rest" until she obtained Egbert's testimony. She believed he would be available in a few days. The court was concerned about delaying the matter, but decided that defense counsel would begin his case, and then the prosecutor could resume with Deputy Egbert when he was available.

Thereafter, the court advised the jury that a prosecution witness had become unavailable, the People were going to rest "subject to calling that one witness," and they would begin the defense case the following day. The court excused the jury for the rest of the day.

After the jury left, the court stated that defense counsel had been placed in a difficult position if he wanted to make a motion to acquit. The court suggested counsel could make the motion on some counts and reserve on other counts, and counsel agreed.

C. Defendant's Motion for Judgment of Acquittal of Count VI

After the prosecution "closed," defense counsel moved to dismiss all counts, including count VI, burglary, "subject to Officer [*sic*] Egbert being recalled."

As to count VI, the burglary of Ms. Krischan's home, defense counsel argued there was insufficient evidence to support that charge. The prosecutor replied that Deputy Egbert's testimony was relevant to that offense. The court again asked for an offer of proof.

The prosecutor said that Ms. Krischan reported to Deputy Egbert that she believed defendant took her jewelry. Egbert found the blue Camaro and it contained Ms. Krischan's stolen jewelry. When Ms. Krischan reported the burglary and theft to Deputy Egbert, she did not say that Ms. Murphy had been in the house with defendant. The prosecutor stated Ms. Krischan did not say anything about Ms. Murphy until the time of

trial, when Ms. Murphy had moved into Ms. Krischan's house, and she was not happy about the living arrangements.

Defense counsel argued count VI should be dismissed because Ms. Krischan testified she did not believe defendant stole the jewelry; she saw Ms. Murphy coming out of her bedroom with a bag; and Ms. Murphy left in a hurry. Counsel argued Deputy Egbert's testimony would not affect Ms. Krischan's testimony on those issues, and there was no evidence defendant committed the burglary.

D. The Court's Denial of the Motion

The court denied defendant's motion for judgment of acquittal as to all counts.

As to count VI, burglary of Ms. Krischan's home, the court made lengthy findings.

> "[Y]ou have Ms. Krischan coming into court saying, 'I don't think the defendant did it.' … I suppose a jury could find, because she admitted to being friends with the defendant, that she's changed her testimony. I didn't hear anything in the recital or the offer of proof from [the prosecutor about Deputy Egbert's projected testimony] that impeached Ms. Krischan's testimony. She may not have told the cops about this Dawn Murphy person, but I don't know if that impeaches her.
>
> "On the other hand, a jury could find that because the stolen property … is in the Camaro when it's recovered on January 4th, shortly after this alleged burglary, and that the defendant was at the house at the time, I suppose the jury could find that [defendant] let Ms. Murphy in and that he is therefore complicity [*sic*], that he aided and abetted the burglary.
>
> "There is certainly no direct evidence that he committed the burglary. There's a lot of inferences that they could draw from the evidence to conclude … that he either aided or abetted or participated in the burglary, and so it's not proof beyond a reasonable doubt.
>
> "Is there evidence from which a jury could find that he was either an aider or abettor or a principal in the burglary? I think the answer is yes. That's a question for the jury and there's enough evidence that it would support a conviction on appeal.
>
> "Whether they're going to make those findings, again, is a question for the jury, and the question that I'm certain that the attorneys will have substantial argument about."

After the court denied the motion, the defense presented its case, and then the prosecutor resumed with Deputy Egbert's trial testimony. As set forth above, Egbert testified about Ms. Krischan's report of the burglary and jewelry theft, his discovery of the blue Camaro, searching the car, and finding the pill bottle in defendant's name and some of the jewelry.

As to count VI, the jury was instructed that defendant could be guilty of burglary either as a principal or an aider or abettor. Defendant was convicted of the charge.

E. Penal Code Section 1118.1

Defendant's motion for judgment of acquittal was brought pursuant to Penal Code section 1118.1, which states in pertinent part:

> "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal…."

"In ruling on a motion for judgment of acquittal pursuant to [Penal Code] section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, ' "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.]' [Citation.] 'Where the [Penal Code] section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212–1213.)

"We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. [Citations.] We also determine independently whether the evidence is sufficient under the federal and state constitutional due process clauses." (*People v. Cole, supra,* 33 Cal.4th at p. 1213.)

F. Burglary, Principals, Aiding and Abetting

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building ... with intent to commit grand or petit larceny or any felony is guilty of burglary...." (Pen. Code, § 459.)

A person can be guilty of a crime as a perpetrator or as an aider and abettor. (Pen. Code, § 31.) "An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 161.)

"[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus – a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea – knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus – conduct by the aider and abettor that in fact assists the achievement of the crime. [Citation.]" (*People v. Perez* (2005) 35 Cal.4th 1219, 1225; *People v. Nelson* (2015) 240 Cal.App.4th 488, 496; *People v. Avila* (2006) 38 Cal.4th 491, 564.)

"[I]n general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.] However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

"Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment. [Citations.]" (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329; *People v. Campbell*, *supra*, 25 Cal.App.4th at p. 409.)

G. Analysis

The trial court properly denied defendant's motion for judgment of acquittal of count VI, residential burglary of Ms. Krischan's residence. Defendant argues there was no credible evidence he was culpable as either the direct perpetrator or an aider and abettor, and the "mere fact" he had previously been at the house with Ms. Murphy was insufficient to raise an inference of wrongdoing.

While defendant cites Ms. Krischan's trial testimony that she no longer believed defendant stole her jewelry, the court properly denied the motion because the jury was entitled to weigh the credibility of her statements against her description of defendant's conduct prior to and after the burglary and theft of the jewelry. Ms. Krischan testified she had shown defendant her jewelry in the past, although he did not have permission to be in her bedroom. Defendant appeared on the day in question with Ms. Murphy, and asked Ms. Krischan to drive around two other friends so they could run errands because he purportedly had a "bad wheel" on his car. Ms. Krischan agreed, and defendant and Ms. Murphy left. When Ms. Krischan returned a few hours later, she found Ms. Murphy inside her house without her permission. Ms. Murphy was walking out of the bathroom adjacent to Ms. Krishcan's bedroom and holding two small bags. Ms. Murphy declined her offer of a ride, and instead got into a waiting cab. Ms. Krischan then discovered her jewelry had been stolen, called defendant, and accused him of taking it. Defendant was upset and replied, " 'No, it's not like that,' and, 'I'll get it back for you.' " Later that night, defendant sent a text message that he was able to get her property and would see her shortly, but he never appeared.

Based on Ms. Krischan's testimony, the jury could have found that defendant aided and abetted the burglary and jewelry theft by using a ruse to get Ms. Krischan to leave her house for several hours and sending Ms. Murphy into the house to look for and steal the jewelry while she was gone. Defendant asserts this conclusion is rebutted by evidence that he offered to try to recover the jewelry after Ms. Krischan accused him of

being responsible for the burglary and theft. After he was confronted by Ms. Krischan's accusations, however, defendant's response was similar to the apology he gave to Ms. Miller when she found him hiding by the stolen Mazda – defendant promised to make things right for Ms. Krischan, just as he signed over his truck to Ms. Miller in exchange for stealing and damaging the Mazda.

While defense counsel moved to dismiss count VI before Deputy Egbert appeared, the prosecutor made an offer of proof of his proposed testimony – that Egbert found the blue Camaro and some of Ms. Krischan's jewelry was in the car, along with a pill bottle in defendant's name. The People had already introduced evidence that linked defendant to that blue Camaro.

Defendant argues on appeal that the People's evidence showed Ms. Murphy independently committed the burglary and jewelry theft without defendant's participation, defendant was able to regain the jewelry from Ms. Murphy, and he would have returned it to Ms. Krischan, but he instead became involved in the second high speed pursuit while driving the Camaro. However, the evidence also supported the opposing inference – defendant evaded the traffic stop and probable arrest because he was in possession of Ms. Krischan's stolen property.

Based on the entirety of Ms. Krischan's testimony and the People's evidence, we find the court properly denied defendant's motion to acquit on count VI.

III. Consecutive Sentences for Counts VII and VIII

Defendant was convicted of two felony offenses arising from Deputy McCaig's pursuit of the Camaro on January 4, 2015: count VII, evading an officer in willful disregard for public safety (Veh. Code, § 2800.2, subd. (a)); and count VIII: assault upon a police officer, Deputy McCaig, when he backed up the Camaro as McCaig started to get out of the patrol car and hit the vehicle after McCaig got back in (Pen. Code, § 245, subd. (c)).

The court imposed consecutive terms of eight months (one-third the midterm) doubled to 16 months for count VII, and one year four months (one-third the midterm), doubled to two years eight months for count VIII.[20]

Defendant contends the court should have stayed the term imposed for count VII, felony evading, pursuant to Penal Code section 654.

A. Background

At the sentencing hearing, defense counsel argued that both counts VII and VIII were based on the same conduct of defendant's attempt to flee during Deputy McCaig's pursuit of the Camaro because "we have the vehicle spinning out on the intersection, backing up, and again attempting to flee against the fact that he glanced off Deputy McCaig," and that Penal Code section 654 applied to one of the counts.

The prosecutor replied defendant had a different criminal objective for each count, and Deputy McCaig testified that "if defendant had been trying to just flee, if he had backed straight up, he would not have struck the officer's vehicle because the door had been closed. However, there is specific testimony and corroborating evidence that showed the defendant turned his vehicle intentionally into the officer's patrol vehicle by striking it, therefore hitting the officer, and committing that assault is separate and independent from trying to flee."

The court rejected defense counsel's arguments and found that while the offenses were committed close in time, defendant had separate and divisible intents for counts VII and VIII, and section 654 did not apply.

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[20] Defendant was also convicted of count IX, misdemeanor driving the Camaro with a suspended license during Deputy McCaig's pursuit on January 4, 2015, with a prior conviction for driving under the influence (Veh. Code, § 14601.2, subd. (a)); the court stayed the term for that conviction under Penal Code section 654.

B. Analysis

"Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. [Citation.] Thus, if all of the crimes were merely incidental to or were the means of accomplishing or facilitating a single objective, the defendant may receive only one punishment. [Citation.]" (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

"If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

" 'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]' [Citation.]" (*People v. Islas*, *supra*, 210 Cal.App.4th at p. 129.) In reviewing the trial court's finding that section 654 does not apply, we determine only whether there is substantial evidence to support the trial court's finding. (*People v. Osband* (1996) 13 Cal.4th 622, 730–731; *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005.) We review the court's factual finding in the light most favorable to the prosecution, presuming the existence of every fact the court could reasonably deduce from the evidence. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 620.)

In this case, defendant had already led Deputy McCaig on a high speed pursuit when he had to suddenly brake to avoid hitting a tree. McCaig testified he pulled his patrol car behind the Camaro's right rear side, started to open his driver's door, and intended to get out. The Camaro's rear taillights suddenly activated. McCaig stayed inside his vehicle and closed the driver's door of his patrol car. The Camaro backed up rapidly and made a slight turn to the right, so the front end swung to the left. The

Camaro's right rear quarter panel hit the left front fender of McCaig's patrol car "in a side swipe kind of collision," and inflicted scrapes, a broken corner marker light, and other damage. McCaig testified that if the driver had driven the Camaro straight back without turning the steering wheel, the Camaro would have missed the patrol car.

"Whether a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses. [Citations.]" (*People v. Corpening* (2016) 2 Cal.5th 307, 313.) While defendant testified at trial, he denied that he was driving the Camaro when Deputy McCaig pursued it. Based on McCaig's undisputed testimony, the court's decision to impose consecutive terms for counts VII and VIII is supported by substantial evidence. Defendant could have backed out of the area without hitting the patrol car, but instead defendant turned the Camaro so that it hit the patrol car shortly after McCaig was trying to get out and then was forced to close the driver's door. Defendant negotiated another turn to escape the area without further hitting McCaig's patrol car. McCaig's testimony supports the trial court's finding that defendant harbored a separate intent and objective when he committed the assault that was independent of and not merely incidental to his objective of evading McCaig under Vehicle Code section 2800.2.

IV. The Prior Serious Felony Enhancement

As part of defendant's aggregate sentence, the court imposed a consecutive term of five years for the prior serious felony enhancement pursuant to Penal Code section 667, subdivision (a). Defendant contends the matter must be remanded for the court to determine whether that term should be stricken in light of subsequently-enacted legislation.

A. Background

Prior to the sentencing hearing, defendant filed a sentencing memorandum and argued the court should impose an aggregate term of 15 years based on using count I, the

violation of Vehicle Code section 10851, subdivision (a), as the principal term, selecting the midterm of two years, and doubling it to four years as the second strike sentence; imposing concurrent midterms for several other counts; and staying the terms for the remaining counts pursuant to Penal Code section 654. Defendant argued that if the court decided not to impose concurrent terms, it should stay additional counts under Penal Code section 654 to reach an aggregate term of 23 years two months. Defendant did not request the court to dismiss the prior strike conviction.

On August 29, 2016, the court conducted the sentencing hearing and reviewed defendant's motion. Defense counsel complained the People had filed alternate counts based on multiple incidents that occurred simultaneously. Defense counsel further argued the court should stay multiple counts that arose from the same sequence of events, and the longest possible aggregate term should be 23 years two months. The prosecutor replied defendant had separate objectives and intents for the multiple counts that arose from each incident.

As set forth above, the court rejected defendant's Penal Code section 654 arguments as to counts VII and VIII. However, the court found defendant had the same intent and objective for other counts, and Penal Code section 654 applied.

The court imposed an aggregate term of 27 years. It selected count VI, first degree residential burglary, as the principle term, and imposed the upper term of six years, doubled to 12 years as the second strike term. The court found aggravating circumstances that defendant's prior convictions as an adult were numerous or of increasing seriousness; he was on probation when the crime was committed; and his prior performance on probation and parole was unsatisfactory, "essentially using his prior record as the circumstances in aggravation." The court did not make any additional findings.

As set forth above, the court imposed a consecutive term of five years to count VI for the Penal Code section 667, subdivision (a) enhancement. The court next imposed

consecutive sentences for the subordinate terms of one-third the midterms, doubled for the second strike terms, and two one-year terms for the prior prison term enhancements. It also stayed certain terms pursuant to Penal Code section 654.[21]

B. Analysis

At the time of the sentencing hearing, the court was statutorily required to impose the Penal Code section 667, subdivision (a) enhancement and did not have any authority to strike or dismiss it. (Pen. Code, §§ 667, former subd. (a)(1); 1385, former subd. (b).)

Defendant argues the matter must be remanded for the court to consider whether to dismiss the Penal Code section 667, subdivision (a) prior serious felony enhancement in furtherance of justice, pursuant to the recent amendments to Penal Code sections 667 and 1385 enacted by Senate Bill No. 1393, effective January 1, 2019, which removed the prohibitions on striking a prior serious felony enhancement. (See Stats. 2018, ch. 1013, §§ 1–2.)

The People concede the amendments apply since defendant's case is not yet final but argue that remand is not appropriate because the record shows the superior court was not inclined to dismiss the enhancement. The People cite to the court's decision to impose the upper term for the principal term, consecutive midterms for the subordinate terms, and not to dismiss the prior strike conviction.

Remand is necessary when the record shows the trial court proceeded with sentencing on the erroneous assumption it lacked discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) If, however, the record shows the sentencing court

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[21] The abstract of judgment correctly states that defendant's aggregate term was 27 years. The People correctly note that the abstract does not list the court's imposition of the five-year term for the prior serious felony enhancement pursuant to Penal Code section 667, subdivision (a), that was imposed consecutive to the sentence for count VI, burglary, the principal term. The minute order also omits the enhancement. On remand for further proceedings on count I, the court shall correct the record accordingly if it decides not to dismiss the five-year enhancement.

" ' "would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' [Citation.]" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).)

In *McDaniels*, the issue was whether remand for the exercise of discretion imparted by Senate Bill No. 620 was proper. *McDaniels* cited to *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, which addressed when reconsideration of sentencing was required under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

"*Gutierrez* concluded that '[r]econsideration of sentencing is required under *Romero* where the trial court believed it did not have discretion to strike a three strikes prior conviction, unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations.' [Citation.] [¶] We see no reason why this same standard would not apply in assessing whether to remand a case for resentencing in light of Senate Bill 620." (*McDaniels*, *supra*, 22 Cal.App.5th at p. 425.)

We note that defendant never requested the court to dismiss the prior strike conviction, and the court never made any findings on that issue. As for the imposition of consecutive sentences, the court made appropriate findings on the reasons for selecting those terms but did not make any additional comments. The court denied defendant's request to stay certain terms under Penal Code section 654, but the court's findings were based on the particular facts of each count, and the court did not make any findings that clearly indicate that it would not have exercised its discretion to strike the prior serious felony enhancement if it had the discretion to do so at the time of time of sentencing.

Based on the limited record of the sentencing hearing, we cannot say the court's sentencing decisions clearly indicate it would not have exercised its discretion to dismiss the prior serious felony enhancement if it had discretion to do so at the time of that hearing.

DISPOSITION

Defendant's felony conviction in count I is reversed, and his sentence is vacated. The matter is remanded for further proceedings on count I consistent with this opinion. On remand the People may either accept a reduction of the charged offense on count I to a misdemeanor with the court to resentence defendant in accordance with that election or retry defendant for a felony violation of Vehicle Code section 10851.

The matter is also remanded for the court to determine whether to strike the five-year term imposed for the prior serious felony enhancement pursuant to Penal Code section 667, subdivision (a).

On remand, if the superior court decides not to strike the prior serious felony enhancement, the court must correct the minute order and abstract of judgment to reflect that it imposed the five-year term under Penal Code section 667, subdivision (a) consecutive to the term imposed for count VI.

In all other respects the judgment is affirmed.

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POOCHIGIAN, Acting P.J.

I CONCUR:

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DESANTOS, J.

PEÑA, J. Concurring

I concur in the majority opinion but write separately to emphasize the circumstances in this case are unlike the circumstances in *In re D.N.* (2018) 19 Cal.App.5th 898 in any respect, except both cases involve a violation of Vehicle Code section 10851 post-Proposition 47, the Safe Neighborhoods and Schools Act. Here, as in *People v. Gutierrez* (2018) 20 Cal.App.5th 847 (*Gutierrez*), defendant George Michael Lane was charged with both a taking and a driving of the vehicle in question. In *D.N.*, the petition only alleged the minor committed theft of a vehicle. (*D.N.*, at p. 900.) In *D.N.*, despite the complete lack of evidence the vehicle taken had a value of $950 or more, the juvenile court declared the offense was a felony. This was clear error under *People v. Page* (2017) 3 Cal.5th 1175, 1180–1183 (*Page*), which later held there must be proof the stolen vehicle had a value of $950 or more for the offense to be a felony. While conceding the insufficiency of the evidence based on the *Page* decision, rather than concede the minor was entitled to a reduction of the offense from a felony to a misdemeanor, the People argued the case should instead be remanded to allow them to present additional evidence pertaining to the value of the stolen vehicle. The *D.N.* court rejected this contention, noting the People were on notice the changes adopted by Proposition 47 could apply to vehicle thefts, and double jeopardy principles prohibited a second bite at the apple. (*D.N.*, at pp. 901–903.)[1]

In stark contrast, this case was tried by a jury presented with two theories of guilt—driving or taking of a vehicle, both of which were argued by the prosecutor and both of which are supported by the evidence. No evidence was presented, however, on the value of the vehicle taken, i.e., whether its value was $950 or more, and thus qualified

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[1] Curiously, the *Gutierrez* court characterized this rejection of the Attorney General's argument as an unwarranted criticism of the Kern County Deputy District Attorney who presented the case below. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 858, fn. 12.)

as a felony theft. More importantly, the instructions failed to adequately instruct the jury on the vehicle value question in light of *Page*'s holding Proposition 47 applies to vehicle theft. The critical point is not that insufficient evidence supported *felony* theft of the vehicle. Rather, the failure of the jury instructions to require proof of felony theft ($950 value or more) rendered the instructions legally inadequate under *Page*. As explained in *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*):

> "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green* [*People v. Green* (1980) 27 Cal.3d 1], the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground."

This case falls within the latter category of cases discussed in *Guiton*—an erroneous instruction that permitted the jury to convict defendant of felony theft even though no evidence proved the stolen vehicle was worth $950 or more. Furthermore, because the record provides no basis on which to conclude the felony verdict was actually based on the valid ground of posttheft driving of the stolen vehicle, reversal is required under *Guiton*.[2] On the other hand, the jury instructions, the verdict and the evidence show defendant, at a minimum, committed misdemeanor theft. Consequently, giving the People the option to accept reduction of the offense to a misdemeanor in lieu of a retrial of this offense is fair to both defendant and the People. Therefore, I concur in the judgment.

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PEÑA, J.

[2] The California Supreme Court is currently considering the correct harmlessness standard for instruction on alternative legal theories when one is correct and the other is incorrect. (*People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105.)